

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
DOMINIC J. BASILE, SR.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period June 1, 1988	:	
through August 31, 1989.	:	DETERMINATION
	:	DTA NOS. 809483
	:	AND 809794

In the Matter of the Petition	:	
of	:	
DOMINIC J. BASILE, OFFICER OF	:	
WALT'S SUBMARINE SANDWICHES, INC.	:	
for Revision of a Determination or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period March 1, 1988	:	
through February 28, 1990.	:	

Petitioner, Dominic J. Basile,¹ 981 Washington Avenue, Albany, New York 12206, filed petitions for revision of determinations or for refunds of sales and use taxes under Articles 28 and 29 of the Tax Law for the periods June 1, 1988 through August 31, 1989 and March 1, 1988 through February 28, 1990.

A hearing was held before Dennis M. Galliher, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on September 8, 1992 at 9:30 A.M., with all briefs to be submitted by

December 15, 1992. Petitioner, appearing by Richard V. D'Alessandro, P.C. (Richard V.

¹Dominic J. Basile and Dominic J. Basile, Sr., as referenced in the caption, are one and the same person.

D'Alessandro, Esq., of counsel), filed an initial brief on October 29, 1992. The Division of Taxation, appearing by William F. Collins, Esq. (Donald C. DeWitt, Esq., of counsel), filed a responding brief on November 20, 1992, followed by a correcting letter dated November 25, 1992. Petitioner's representative filed a reply brief on December 14, 1992.

ISSUES

I. Whether petitioner was a person under a duty to collect and remit sales and use taxes on behalf of Walt's Submarine Sandwiches, Inc. pursuant to Tax Law §§ 1133(a) and 1131(1) during the periods at issue.

II. Whether, if so, petitioner has nonetheless advanced grounds sufficient to warrant abatement of penalties imposed.

FINDINGS OF FACT

Petitioner, Dominic J. Basile, was co-founder of a business incorporated under the name of Walt's Submarine Sandwiches, Inc. ("Walt's"). The corporation operated various fast food shops throughout the area of Albany and Schenectady, New York, selling hot and cold submarine sandwiches and other food items.

Between approximately April 3, 1990 and September 7, 1990, the Division of Taxation ("Division") conducted a field audit of the sales and use tax liability of Walt's for the period spanning December 1, 1986 through February 28, 1990.

As a result of the aforementioned audit, the Division issued a total of five notices of determination and demands for payment of sales and use taxes due against Dominic J. Basile, assessing Mr. Basile as a person under a duty to collect and remit sales and use taxes on behalf of Walt's. These notices, together with the periods to which they pertain, are set forth as follows:

<u>Issuance Date</u>	<u>Notice No.</u>	<u>Period</u>	<u>Tax Assessed</u>
4/20/90	S900420700A	6/1/88-8/31/88	\$ -0-
4/20/90	S900420701A	12/1/88-2/28/89	15,796.59
4/20/90	S900420702A	3/1/89-5/31/89	31,278.74
4/20/90	S900420703A	6/1/89-8/31/89	43,429.26
9/11/90	S900914004A	3/1/88-2/28/90	12,391.96

Notice Number S900420700A, listed first above and covering the period June 1, 1988 through August 31, 1988, assesses penalty only, in the amount of \$228.34, with zero tax assessed. The other four notices were issued for tax, penalty and interest; their listing above reflects the tax assessed, but does not reflect the dollar amounts of penalty and interest assessed.

Petitioner requested conciliation conferences to challenge the above-described assessments. On January 25, 1991, a Conciliation Order was issued with respect to the first four notices set forth above. Pursuant to this Order, these notices were reduced to the respective amounts of \$196.67 (penalty only), \$15,042.43, \$31,278.74,² and \$33,097.59 (plus penalty and interest). A second Conciliation Order dated May 3, 1991 sustained in full the fifth notice described above (plus penalty and interest).

For many years, petitioner was fully involved and in charge of all aspects of operating and expanding Walt's business, including daily visits to each of its local stores. In or about July 1986, petitioner's health was in decline and he reduced to some degree his physical activities in the operation of Walt's. In view of these circumstances petitioner's brother,

Joseph Basile, was elected president of Walt's and petitioner "retired". However, petitioner continued to receive full salary and benefits, retained the position of chairman of the board of directors of Walt's, and as described hereinafter remained involved to some degree in the operation of Walt's business. At all times from July 1986 through the period in question, petitioner owned 66-2/3% of Walt's issued and outstanding shares of stock while Joseph Basile owned the remaining 33-1/3% of Walt's stock. Walt's board of directors consisted of petitioner, Joseph Basile and one Walter Breakell.

As of early 1988, petitioner had become dissatisfied with Joseph Basile's performance as president of Walt's. In turn, on or about March 17, 1988, petitioner convened a purported meeting of Walt's board of directors. This meeting was attended by petitioner, his wife Jeanette

²The dollar amount of notice number S900420702A apparently was not changed (reduced) as the result of the conciliation proceedings.

Basile, and one Norman Tillman, but did not include Joseph Basile or Walter Breakell. At this meeting, petitioner moved to oust Joseph Basile as president of Walt's, to name himself to such position, and to relegate Joseph Basile to the position of vice-president/director of marketing. Petitioner's wife also moved to appoint Norman Tillman as executive vice-president of Walt's. These actions were "approved" by those present at the meeting.

In response to these actions, Joseph Basile commenced a proceeding in Supreme Court, Albany County, by Order to Show Cause dated June 23, 1988, seeking judicial dissolution of Walt's pursuant to Business Corporation Law ("BCL") § 1104-a.³ By this proceeding, Joseph Basile sought to void

the above-described acts. More specifically, he sought to be returned to the office of president with full salary and benefits, a limitation against petitioner changing the composition of Walt's board of directors, officers and/or stock ownership ratio, an accounting of assets and liabilities and, ultimately, dissolution of Walt's.

The record does not detail what occurred, if anything, on the July 22, 1988 return date for the Order to Show Cause, nor is there any evidence of subsequent judicial intervention in the dissolution proceeding. In April 1990, Walt's filed for Chapter 11 bankruptcy protection. Thereafter, on or about November 27, 1990, Walt's bankruptcy filing was converted from a Chapter 11 (reorganization) proceeding to a Chapter 7 (liquidation) proceeding. There is no evidence that the dissolution proceeding was terminated at any time prior to Walt's April 1990 bankruptcy filing.

As part of its bankruptcy proceeding, Walt's moved for disallowance of all or a portion of the sales and use tax claims filed against it by the Division. The Bankruptcy Court, in turn, issued an order fixing and allowing, in part, the sales tax claims of the Division. As is relevant to this proceeding, the Bankruptcy Court allowed the following amounts for the following

³Pursuant to BCL § 1106, copies of the Order to Show Cause and petition in the dissolution proceeding were required to be served on the (former) State Tax Commission.

periods:

<u>Period</u>	<u>Tax Amount</u>
12/1/88 - 2/28/89	\$15,042.43 (<u>see</u> Notice No. S900420701A)
3/1/89 - 5/31/89	32,816.50 (<u>see</u> Notice No. S900420702A)
6/1/89 - 8/31/89	33,097.59 (<u>see</u> Notice No. S900420703A)
3/1/88 - 5/31/88	915.01 (<u>see</u> Notice No. S900914004A)
6/1/88 - 8/31/88	1,521.30
9/1/88 - 11/30/88	856.21
12/1/88 - 2/28/89	1,041.91
3/1/89 - 5/31/89	958.91
6/1/89 - 8/31/89	668.00
9/1/89 - 11/30/89	879.16
12/1/89 - 2/28/90	59.50

At hearing, the parties stipulated that the amounts remaining at issue are those set by the Order of the Bankruptcy Court, as above, plus penalty and interest, subject to two minor modifications. First, the Division conceded that the \$32,816.50 amount set for the period 3/1/89 - 5/31/89, per order of the Bankruptcy Court, should be reduced to the \$31,278.74 amount initially assessed and subsequently sustained at conference (see Findings of Fact "3" and "4"). The second adjustment involves including the penalty assessed for the period 6/1/88 - 8/31/88 (Notice Number S900420700A) which item was apparently not addressed in the bankruptcy proceeding. Although not specified by either party at hearing said penalty, initially assessed at \$228.34, should presumably be reduced to the \$196.67 amount determined at conference (see Finding of Fact "4".)

In conducting the audit, the auditor dealt with Norman Tillman. During the course of the audit, the auditor sought to meet with or speak directly to petitioner. However, he never directly met with Mr. Basile, due to Mr. Basile's poor health condition which left him unable to come to Walt's offices. The record does not describe why the auditor was not able (or was not allowed) to speak directly to Mr. Basile during the audit. Information requested by the auditor, if available, was obtained and given to the auditor by Norman Tillman. According to the auditor's testimony Mr. Tillman advised that, for the period December 1, 1986 through February 28, 1988, Joseph Basile was the "officer in charge" and that for the period March 1, 1988 through February 28, 1990, Dominic Basile was the "officer of charge". The auditor's

conclusion that Dominic Basile was responsible to collect and remit sales tax was based, in addition to his discussions with Mr. Tillman, upon the factors that certain sales tax returns bore the stamp-affixed signature of Dominic J. Basile, that petitioner was listed as a shareholder on Walt's income tax returns (owning 67.5% of Walt's shares), that petitioner was paid a salary of some \$36,400.00 annually, and that petitioner devoted 100% of his time to the business (as reflected on Walt's income tax return [Form 1120] for the year 1988).

The auditor testified to his belief that Norman Tillman and Dominic Basile were in fact running the corporation and to his belief, based on discussions with Norman Tillman during the course of the audit, that Dominic Basile was the "ultimate source to answer questions that Norman could not answer".

With respect to the auditor's reliance on sales tax returns, it is unclear exactly which returns were reviewed in detail by the auditor during the audit. However, some 13 sales and use tax returns were introduced in evidence. One such return (for the period 6/1/88 - 8/31/88) was unsigned, one such return (for the period 12/1/88 - 2/28/89) bore the signature of Norman Tillman, and the balance of such returns (covering periods between 3/1/88 - 3/31/90) each bore a stamp-affixed signature reading "Dominic J. Basile - Pres.".

Petitioner testified regarding his brother's commencement of dissolution proceedings via the June 23, 1988 Order to Show Cause, as follows: "[I] assumed that I was under the jurisdiction of the Supreme Court, I think was on the paper, and I had no say in the matter from that point on." Mr. Basile testified he understood this to mean there could be no more shareholder meetings, election of officers, and that matters were to be kept in "status quo".

Dominic Basile testified that during the period in question he was under ongoing medical treatment for edema and for an angina condition, both of which limited his mobility. He testified that during the period at issue he made approximately six visits to Walt's corporate offices located at 155 Exchange Street in Albany. He indicated that Norman Tillman generally ran the corporation during the period 1988 through 1990, overseeing the office functions and operations, including the filing of tax returns and payment of taxes including sales tax.

Petitioner alleged that he had no "active role" in the management of the corporation, and that that he did not direct Mr. Tillman as to the day-to-day "nitty gritty" operational aspects of the business.

Petitioner noted that he, Joseph Basile and Norman Tillman were the three authorized signatories to Walt's bank accounts. Petitioner explained that while he was authorized to sign checks and other documents, he delegated the authority to stamp-sign his name to Norman Tillman, "rather than have Norman keep sending me papers." Petitioner continued to receive a paycheck in the approximate amount of \$700.00 per week throughout the audit period. He described his salary as being for the responsibility of overseeing and conducting staff meetings at his home, plus "keeping the policies of the company in line with respect to the food aspect of the business", as well as for his title of chairman of the board. Petitioner received the highest salary of anyone in the corporation, and was aware of and was involved in setting other employees' salaries. Petitioner had the authority to hire and fire personnel as did the supervisory staff employed by Walt's. He explained that supervisors could hire and fire at the store level, and that only if an upper-level supervisory person's firing or hiring was in question would he become involved. Petitioner had use of a corporate automobile as did all supervisory personnel.

Petitioner testified that he first learned of the sales tax liability at issue at or about the time of Walt's bankruptcy filing, when Norman Tillman advised him that Walt's "had not been keeping up with sales tax." In this regard, petitioner alluded to a prior experience where the corporation had paid bills instead of sales tax, ultimately resulting in a sales tax liability determined on audit. Petitioner stated he had "made it clear [apparently to Mr. Tillman] I didn't want it to happen again." Petitioner testified he told Norman Tillman, "you know how I feel about this and you know the position that it places me in." In turn, Norman Tillman allegedly presented petitioner with a letter of resignation. However, petitioner did not accept Mr. Tillman's resignation and, in view of petitioner's health situation, Norman Tillman agreed, at petitioner's request, to stay on with Walt's.

The only documentary evidence presented with respect to the proceeding for judicial dissolution was a copy of the Order to Show Cause commencing such proceeding, together with annexed affidavits and the petition for dissolution. Review of the Order to Show Cause indicates the same does not specifically seek to prohibit or enjoin Walt's from carrying out its daily operational activities. The Order to Show Cause does indicate, inter alia, that on its return date a showing would be required as to why a temporary receiver should not be appointed to conduct the corporation's activities. There is, however, no evidence that such a receiver was in fact appointed. Petitioner also alluded to his understanding that as part of resolving the dissolution proceeding, attempts would be made to value his brother Joseph Basile's stock ownership interest in Walt's and to pay Joseph Basile for the same. Petitioner noted that such efforts were terminated at or about the time of bankruptcy filing.

A reading of the Order to Show Cause and Petition for Dissolution as well as the annexed affidavits provides some additional background in this matter. More specifically, according to these documents petitioner "formally" retired in or about July 1986, although it was claimed that petitioner's activities in the corporation had been diminished for some two years prior thereto due to petitioner's poor health condition. It is also made clear that the dissolution proceeding itself was sparked as the result of the March 17, 1988 meeting described in Finding of Fact "6". The record does not further detail Joseph Basile's responsibilities, duties and/or actions on behalf of Walt's in his role of president. Similarly, the documents do not more specifically disclose or describe Dominic Basile's involvement in the corporation prior to the meeting of March 17, 1988. However, the Order to Show Cause as well as the attached affidavit by Joseph Basile list petitioner as the majority shareholder and the "individual in control of" Walt's.

Submitted as part of petitioner's brief were proposed findings of fact numbered "1" through "27", plus a request for ultimate findings of fact numbered "28" and "29". Petitioner's request to find such facts is addressed as follows:

- proposed facts "1", "2", "3", "6", "8", "9", "11", "12", "16", "17", "18", "19", "20",

"21", "22", "24", "25", "26" and "27" are accepted and have been incorporate hereinabove;

- proposed fact "4" is accepted insofar as it states that "[a]s a result of the dissolution proceeding, the Corporation and petitioner became subject to the jurisdiction and supervision of the Supreme Court . . .", but is otherwise rejected as overly broad and as setting forth a conclusion of law;

- proposed fact "5" is rejected as setting forth a conclusion of law;

- proposed fact "7" is accepted only as a reflection of part of petitioner's testimony, noting that such proposed fact is not entirely consistent with the balance of the record, including, to some degree, the balance of petitioner's testimony as to his actions;

- proposed fact "10" is rejected as misleading, in that while petitioner did not personally and physically sign the noted documents, such documents were stamp signed in petitioner's name by another person specifically authorized to use petitioner's signature stamp;

- proposed facts "13" and "14" are modified to more accurately reflect the record, to wit, that Mr. Tillman managed the day-to-day operational aspects (the "nitty gritty") of the business. Similarly, proposed fact "15" has been modified to provide that Mr. Tillman undertook the described filing and payment duties in his day-to-day managerial role, undertaking such role at petitioner's request. As modified, these proposed facts are accepted;

- proposed fact "23" is accepted only as a reflection of petitioner's testimony;

- proposed fact "26" is accepted only as a partial listing of the auditor's bases for concluding an assessment against petitioner was warranted (omitted from such listing is, inter alia, the auditor's reliance on conversations during audit with Mr. Tillman); and

- proposed facts "28" and "29" are rejected as constituting conclusions of law on the ultimate issues presented for determination herein.

CONCLUSIONS OF LAW

A. Tax Law § 1131(1) defines "persons required to collect tax" to include:

"[A]ny officer, director or employee of a corporation or of a dissolved corporation, any employee of a partnership or any employee of an individual proprietorship who as such officer, director or employee is under a duty to act for such corporation, partnership or individual proprietorship in complying with any requirement of [Article 28]"

Tax Law § 1133(a), in turn, imposes liability as follows:

"every person required to collect any tax imposed by [Article 28] shall be personally liable for the tax imposed, collected or required to be collected under [Article 28]."

B. Matter of Autex Corp. (Tax Appeals Tribunal, November 23, 1988) summarizes the factors which are considered relevant in determining whether an individual is responsible for the sales and use taxes due from a corporation, as follows:

"The determination that an individual is a responsible officer depends upon the particular facts of each case (Stacy v. State, 82 Misc 2d 181, 183). Factors stated by the Division's regulations are whether the person was authorized to sign the corporate tax return, was responsible for managing or maintaining the corporate books or was permitted to generally manage the corporation (20 NYCRR 526.11[b][2]).

"Other indicia developed by the case law are: the authorization to hire or fire employees, the derivation of substantial income from the corporation or stock ownership (Blodnick v. State Tax Commn., 124 AD2d 437); the individual's possible shared status as an officer, director or stockholder (Cohen v. State Tax Commn., 128 AD2d 1022, 1023); the individual's day-to-day responsibilities, involvement with, knowledge of and control over the financial affairs and management of the corporation, the duties and functions as outlined in the certificate of incorporation and the bylaws, the preparation and filing of sales tax forms and returns (Vogel v. NY Tax and Finance, 98 Misc 2d 222, 225-226); and the payment, including the authorization to write checks on behalf of the corporation, of other creditors other than the State of New York and the United States (Chevlowe v. Koerner, 98 Misc 2d 388, 391)" (Matter of Autex Corp., supra).

C. Summarized as a general proposition, the issue to be resolved is whether petitioner had or could have had the ability, in fact as well as in law, to control the affairs of the corporation so as to be considered a person under a duty to collect and remit the unpaid taxes in question (Matter of Constantino, Tax Appeals Tribunal, September 27, 1990; Matter of Chin, Tax Appeals Tribunal, December 20, 1990).

D. Petitioner's first argument is that as of the June 23, 1988 commencement of the

dissolution proceeding in Supreme Court, he was precluded by law from exercising any authority he might otherwise have had over the corporation. This position is rejected. First, the only evidence as to the dissolution proceeding is the Order to Show Cause and supporting papers initiating such proceeding. As described, the dissolution proceeding was commenced by Joseph Basile in response to an allegedly improper shareholders' meeting called by petitioner to remove Joseph Basile as president and diminish his role in the company and his salary and benefits. Petitioner, in turn, was to assume the office of president of Walt's. The immediate aim of the dissolution proceeding was to void this purported shareholders' meeting and its results as illegal, and restore the corporation to its pre-March 17, 1988 status, i.e., principally to restore Joseph Basile as president of Walt's with full salary and benefits. The long-term aim was valuation, dissolution and payoff (or buy-out) as described.

In view of this background, it seems petitioner's testimony that he "was under the jurisdiction of the Supreme Court . . . and I had no say in the matter" meant that he could not oust Joseph Basile or reconfigure the corporation's board of directors, organizational setup or stock ownership ratio. This is borne out by petitioner's testimony of his understanding that there "could be no more shareholder meetings, election of officers, and that matters were to be kept in status quo." In short, he believed that matters were to continue as they had been prior to March 17, 1988. Returning to Walt's pre-March 17, 1988 operational mode and remaining under court jurisdiction pending dissolution would not of itself prevent petitioner from carrying out those duties over which he had authority prior to March 17, 1988. The fact that petitioner was rebuffed in his efforts to change the organization and insert himself as president does not mean, necessarily, that he had no authority and involvement in Walt's thereafter. On this score, there is no evidence that the actual manner of operating Walt's was changed as a result of the commencement or pendency of the dissolution proceeding, or that petitioner's actual involvement in such operation diminished from its pre-March 17, 1988 level. By contrast, it seems petitioner's activities in fact may have increased.

E. It is noteworthy that the Order to Show Cause requires petitioner (and Walt's) to show

cause why a temporary receiver should not be appointed (per BCL § 1202). However, there is neither evidence nor allegation that such a receiver was ever appointed, or that petitioner's authority to act in the ordinary course of business was in any other way reduced. Petitioner continued to receive his salary during the pendency of the dissolution proceeding, yet there is no evidence that court permission was required to effect this payment. In the same vein, since Walt's continued in operation for nearly two years after commencement of dissolution proceedings and before seeking bankruptcy protection, it is presumed that other ongoing bills (e.g., employees' wages, payments to suppliers, landlords, etc.) were paid, yet there is no indication court permission was sought or required for these payments. Such ongoing payments should have also included payment of ongoing sales tax liability. In sum, there is no evidence that commencement of the dissolution proceeding caused any change other than restoring Walt's pre-March 17, 1988 manner of operation, or that those in positions of responsibility, including those under a duty to collect and remit sales tax, were absolved of such responsibility or were otherwise precluded from carrying out such duty.

F. Having concluded that commencement of the dissolution proceeding and its pendency, as described, did not alone relieve petitioner of the duty to collect and remit sales and use taxes narrows the question to whether petitioner was a person whose position, authority and acts within the corporation left him with the duty and ability to collect and remit. The main claim against such status is that petitioner's poor health left him unable to discharge any such duties, and that since Norman Tillman ran the day-to-day operation of the business and did not advise petitioner of unpaid tax liability, petitioner was not responsible. The evidence, however, militates against this position. Petitioner, though described as "retired" in certain documents, nonetheless remained active in the business, as evidenced by his conduct of staff meetings and by his activities in keeping company food policies "in line". He admitted that he was involved in setting employee salary amounts, had authority to hire and fire employees, and while the "nitty gritty" of daily operation was left to Norman Tillman, petitioner would get involved if a serious question arose. This latter fact, testified to by petitioner, lends credence to the auditor's

impression or observation that petitioner was "the ultimate source to answer questions." It seems clear that petitioner was more than just a passive shareholder in retirement. In fact, it appears the main change occasioned by petitioner's poor health was that he no longer visited each of Walt's sub shops or its corporate offices on a daily basis. There is no evidence as to what role, if any, Joseph Basile played in the corporation when restored to the position of president, or that his reinstatement diminished petitioner's actual authority or involvement. Petitioner's delegation of authority to sign, by stamp, so that Mr. Tillman would not keep "sending over papers", is mainly an accommodation for convenience and does not absolve petitioner of responsibility (cf., Matter of Barton, Tax Appeals Tribunal, December 28, 1989; Matter of LaPenna, Tax Appeals Tribunal, March 14, 1991). There is no evidence that petitioner was denied access to Walt's books and records at any time. In sum, the overriding sense is that despite his health problems and the pending dissolution proceeding, petitioner continued to be in fact the operating force in or behind the corporation; in short, a person in a position of authority with a responsibility to act. Given petitioner's involvement in the corporation in both a managerial and ownership capacity leaves clear that petitioner was a person under a duty to collect and remit taxes, whose failure to have done so leaves him personally responsible for such unpaid taxes. Accordingly, the assessments of tax liability against petitioner described in Finding of Fact "3", reduced however to the bankruptcy amounts described in Finding of Fact "9", and further reduced per stipulation as described in Finding of Fact "10", are sustained.

G. Tax Law § 1145(a)(1)(i) imposes penalty for failure to file a sales tax return or to pay over any tax due under Article 28 in a timely manner. The statute goes on to provide for the cancellation of such penalty and abatement of interest above the minimum if the failure, delay or omission was due to reasonable cause and not willful neglect (Tax Law § 1145[a][1][iii]).

H. "Reasonable cause" is defined in 20 NYCRR 536.5(c) to include:

"(3) The inability, for reasons beyond the taxpayer's control, to timely obtain and assemble essential information required for the preparation of a complete return, despite the exercise of reasonable efforts The relevant facts affecting that portion of the tax liability which cannot be ascertained must be fully disclosed

(5) Any other cause for delinquency which would appear to a person of ordinary prudence and intelligence as a reasonable cause for delay and which clearly indicates an absence of willful neglect may be determined to be reasonable cause. Ignorance of the law, however, will not be considered as a basis for reasonable cause."

The absence of willful neglect alone is not a sufficient basis for cancelling penalties and interest (20 NYCRR 536.5[a][3]). Rather, petitioner bears the burden of establishing both reasonable cause as well as the absence of willful neglect (Matter of T.V. Data, Tax Appeals Tribunal, March 2, 1989). The regulations further provide that a key factor to be considered in ascertaining whether reasonable cause and good faith exists is the nature and extent of the taxpayer's efforts to ascertain proper tax liability (20 NYCRR 536.5[d][2]).

I. Petitioner testified that during the pendency of the proceeding for corporate dissolution, he was under the impression that he could "take no action without the authority of the court." However, whatever his impression may have been, petitioner has not shown that he was prevented from having access to the books and records of the corporation during the audit period or that he made any efforts to ascertain that the sales tax returns which bore his signature stamp represented the correct amount of sales tax due and owing for the period, or that the same was paid. There is no evidence or any claim that petitioner sought or directed anyone else to seek court authority to pay sales tax liabilities or any other corporate obligations, even though petitioner allegedly assumed he could do nothing without court approval. In sum, petitioner has not met his burden of proof to show that the failure to properly report and pay sales tax during the audit period was due to reasonable cause and not due to willful neglect. Therefore, the penalty and interest imposed in this matter are sustained.

J. The petitions of Dominic J. Basile are hereby denied and the notices of determination and demands for payment of sales and use taxes due dated April 20, 1990 and September 11,

1990, as modified and reduced as described in Findings of Fact "9" and "10", are sustained.

DATED: Troy, New York
March 18, 1993

/s/ Dennis M. Galliher
ADMINISTRATIVE LAW JUDGE